No. 01-805

In the Supreme Court of the United States

GEORGE ERVIN FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999), is unconstitutional.

2. Whether the district court abused its discretion in not requiring expert testimony that at least one of the sexually explicit depictions received by petitioner was of a minor.

3. Whether the jury permissibly found that at least one of the depictions received by petitioner constituted a "lascivious exhibition of the genitals or pubic area" within the meaning of 18 U.S.C. 2256(2)(E).

4. Whether the district court abused its discretion under Federal Rules of Evidence 402 and 403 in admitting into evidence the images that petitioner received by computer.

5. Whether the errors alleged by petitioner denied him a fair trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 248 F.3d 394. The memorandum opinion of the district court (Pet. App. 33-37) is reported at 74 F. Supp. 2d 696.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2001. A petition for rehearing was denied on May 21, 2001 (Pet. App. 39). The petition for a writ of certiorari was filed on August 20, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on one count of knowingly receiving child pornography that has been mailed, shipped, or transported in interstate commerce by computer, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. V 1999). He was sentenced to 46 months' imprisonment, to be followed by three years of supervised release. He was also ordered to pay a $5000 fine. The court of appeals affirmed. Pet. App. 1-4.

1. On the morning of July 11, 1997, petitioner, who was employed by a private investigation firm in Beaumont, Texas, told the owner of the firm, Keith McGraw, that he (petitioner) had been working on the computer in McGraw's office when pornographic images suddenly appeared on the screen. Petitioner said that he was in the process of trying to discover the source of the pornography. McGraw reported the incident to the FBI, which questioned petitioner. Pet. App. 2; Gov't C.A. Br. 4-5.

Petitioner told the FBI that the night before he told McGraw about the sudden appearance of pornographic images on the latter's computer, he (petitioner) had received an e-mail from someone using the screen name "Opulot," who did not want to receive any more of "this stuff." Opulot also stated that "he or she had obtained the addressees' screen names and intended to forward them to the Internet provider, America Online, so that the addressees could be 'put in jail.'" Pet. App. 2; Gov't C.A. Br. 5.

Almost two years later, in March 1999, petitioner gave the FBI a different account of how he had happened to receive the pornography on the computer.

Petitioner admitted that he had "put his name on a list" to receive child pornography, and that he thereafter began to receive and send such material. Petitioner insisted that he had done so only as part of his own "investigation" into Internet child pornography, with the intention of turning over to the authorities any "evidence" he collected. Pet. App. 2-3; Gov't C.A. Br. 6; see also Pet. App. 24-25.

Petitioner's computer files contained numerous pornographic images, 17 of which were entered into evidence at his trial. Petitioner had transmitted two of these images over the Internet just three days before he told McGraw that child pornography was appearing on his computer. Each of these two images depicts a young girl in a state of undress; one bears the comment, "Here's my 15-year-old niece, Sky," and the other bears the comment, "Here's another of Poppy." Pet. App. 3; Gov't C.A. Br. 6, 15; see also Gov't C.A. Br. 18-25 (describing the 17 images).

2. Petitioner was indicted on one count of knowingly receiving child pornography transmitted by computer in violation of 18 U.S.C. 2252A (Supp. V 1999). Pet. App. 3. The Child Pornography Prevention Act of 1996 (CPPA) defines child pornography to include any visual depiction, including any "computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8) and (8)(B) (Supp. V 1999).[1]

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[1] The CPPA also defines child pornography to include any visual depiction the production of which "involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999); any visual depiction "advertised, promoted, presented, described, or distributed in * * * a manner that conveys the impression that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C.

Petitioner moved to dismiss the indictment on the ground that, insofar as 18 U.S.C. 2256(8)(B) (Supp. V 1999) included visual depictions that "appear[] to be" of a minor engaging in sexually explicit conduct, the statute prohibited "private possession of adult pornography" and was vague and overbroad and therefore violative of the First Amendment. Mot. to Dismiss Indictment at 1-2. The district court denied the motion. Pet. App. 38.

The jury found petitioner guilty. The district court determined that petitioner had failed to accept responsibility for his conduct, and that when he sent some of the pornography to others, he intentionally represented that the depictions were of himself and/or his children. Accordingly, the district court sentenced petitioner to 46 months' imprisonment, which was at the upper end of the Sentencing Guideline range. Pet. App. 4.

3. Petitioner appealed both his conviction and sentence. Pet. App. 4-5. He renewed his First Amendment challenge to the "appears to be" language of 18 U.S.C. 2256(8)(B) (Supp. V 1999). Pet. App. 6. He also argued that the evidence supporting his conviction was insufficient to show (a) that he had a "guilty mind," *i.e.*, that his purpose in receiving the child pornography was other than to "deliver up" those who defile children, *id.* at 24, (b) that he knew the depictions were of individuals younger than 18, *id.* at 25, and (c) that the images were "lascivious[]," *ibid.* In addition, he contended that the district court abused its discretion in admitting into evidence copies of 17 of the images found in his com-

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2256(8)(D) (Supp. V 1999); and any visual depiction "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999).

puter files, because they had been introduced without expert testimony that each depiction was either of a minor or of someone who appeared to be a minor, *id.* at 27, and because the images were unfairly prejudicial, *ibid.*

With respect to his sentence, petitioner contended that the district court violated the Ex Post Facto Clause by using a version of the applicable Sentencing Guideline that had been amended after commission of the offense but before sentencing. Pet. App. 29. He also claimed that the district court lacked an adequate factual basis for enhancing his offense level for receiving material involving prepubescent minors, *id.* at 30-31, even though he acknowledged that "[s]ome of the photos appear to be [of] prepubescent children," Pet. C.A. Br. 18, and even though the district court found that it was "obvious" in reviewing the images that "several were under the age of twelve, possibly * * * six or seven." Pet. App. 30. Finally, he argued that he should have received a sentence reduction for acceptance of responsibility. *Id.* at 31-32.

4. The court of appeals affirmed. Pet. App. 32. The court found that Section 2252A's prohibition on visual depictions that "appear[] to be" of minors engaging in sexually explicit conduct is neither unconstitutionally overbroad, *id.* at 20, nor vague, *id.* at 23, but rather "is fully consonant with the First Amendment." *Id.* at 15 (expressly agreeing with the First, Fourth, and Eleventh Circuits).

Next, the court ruled that petitioner's insufficiency claim "widely misses the mark." Pet. App. 24. The court explained that petitioner (a) "seriously mischaracterize[d] the statute's scienter element" as requiring more than the knowing receipt of child pornography, (b) presented "no * * * evidence" at trial that

any public official had engaged him to participate in covert investigations, and (c) was trying to have it both ways—on the one hand, he admitted to the FBI that he had signed up to receive child pornography, and on the other hand, he denied knowing that the images he received and transmitted were of minors. *Id.* at 24-25. The court further concluded that the jury could "easily" have found that at least one of the images was "lascivious" within the meaning of 18 U.S.C. 2256(2)(E) (which sets forth the definitions of "sexually explicit conduct"). Pet. App. 26. The court pointed out, *ibid.*, that petitioner "concedes that at least seven of the 17 images shown to the jury" satisfy "'some' or 'most'" of the indicia of "lasciviousness" identified by *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987) (Table), the case on which petitioner relied for the proper standard. Pet. C.A. Br. 13, 19-20.[2]

The court of appeals rejected petitioner's claim that admitting the 17 images taken from his computer files without expert testimony as to the age of the persons depicted was an abuse of discretion, and that the images unfairly prejudiced him. Pet. App. 27-29. Noting that, in order to convict petitioner, the jury needed to find (beyond a reasonable doubt) only that he had received at least one image that appeared to be of a minor, the court cited not only the jury's own opportunity to examine the images, *id.* at 27, but also (a) "an FBI agent's testimony about the common practice of including indications of the age of the subjects in the file names," *id.* at 28, (b) petitioner's concession that "[s]ome of the photos appear to be [of] prepubescent

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[2] Petitioner concedes that, at trial, he did not request an instruction on the *Dost* factors. Pet. 13.

children who are * * * obviously less than 18," *ibid.*, and (c) the fact that two of the images bore petitioner's own description of the subject as his 15-year-old niece, *ibid.* The court further observed that as to two of the images, the age of the subjects was irrelevant because the images met the statutory definition of child pornography because they were visual depictions "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct." *Id.* at 28 n.81 (citing 18 U.S.C. 2256(8)(D) (Supp. V 1999) (emphasis added)). Finally, the court ruled that the admission of the very images that petitioner was charged with receiving did not unfairly prejudice him within the meaning of Federal Rule of Evidence 403.[3] Pet. App. 28-29.

The court concluded that petitioner's sentencing claims lacked merit. The court explained that petitioner was not sentenced in violation of the Ex Post Facto Clause, because his base offense level was prescribed by Sentencing Guidelines § 2G2.2, "which has not changed since [petitioner] committed the offense." Pet. App. 30.[4] As for petitioner's challenge to the enhancement of his offense level for receiving material that "involved a prepubescent minor or a minor under the age of twelve years," Sentencing Guidelines

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[3] Rule 403 provides, in pertinent part, that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."

[4] Petitioner had mistakenly contended that he was sentenced under Sentencing Guidelines § 2G2.4, which was indeed amended after he committed his offense, but which directs the sentencing court to apply Sentencing Guidelines § 2G2.2, which was not amended. See Pet. App. 30.

§ 2G2.2(b)(1), the court had "no difficulty concluding that the district court's determination that at least one of the images received by [petitioner] depicts a prepubescent minor is not clearly erroneous." Pet. App. 31.[5] The court also found no clear error in the district court's refusal to reduce petitioner's offense level for acceptance of responsibility, where the refusal was based on petitioner's failure "to acknowledge any wrongdoing" and petitioner's "blam[ing] the FBI and others for his conviction." *Ibid.* The court further noted that petitioner had denied essential factual elements of the offense at trial and had refused to speak with the probation officer about his involvement in the offense. *Ibid.* In those circumstances, the court explained, the sentencing court was "best positioned to determine whether a defendant has displayed the requisite degree of remorse, contrition, and regret to merit a reduction in his sentence." *Id.* at 32.

DISCUSSION

Petitioner urges (Pet. 4-11) this Court to resolve the circuit conflict over the constitutionality of CPPA's "appears to be" provisions, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V 1999). While this case was on appeal, the Court granted the government's petition for a writ of certiorari in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.[6]

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[5] At sentencing, the district court had found it "quite obvious" that several of the individuals depicted "were under the age of twelve, possibly the age of six or seven." Pet. App. 30.

[6] We note that in the courts below, petitioner challenged the constitutionality of the statute only on First Amendment grounds,

The court of appeals thoroughly considered and correctly rejected petitioner's remaining claims. None of them warrants further review. The government therefore waives its right to respond to them unless the Court directs the government to do so.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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not on due process grounds. His second question presented, which references the Due Process Clause, is therefore not properly before this Court.